STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2000-894

April 29, 2002

WPS ENERGY SERVICE, INC.
Complaint Requesting Commission Action to Amend or Alter Commission Order of September 2, 1998 in Docket No. 1998-138 and Determine Whether Maine Public Service Co. and/or Energy Atlantic Has Violated The Requirement of the Order or the Provisions of Chapters 301, 304, or 322

ORDER APPROVING REVISED STIPULATION

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

In this Order, we approve a Revised Stipulation (Stipulation) submitted to us by Maine Public Service Company (MPS), WPS Energy Services, Inc. (WPS), the Office of Public Advocate (OPA) and the Industrial Energy Consumers Group (IECG). The Revised Stipulation resolves all issues in this matter and revises and refines the standards governing employees shared by MPS, a regulated transmission and distribution (T&D) utility, and Energy Atlantic (EA), its unregulated energy marketing affiliate.

II. BACKGROUND

A. Procedural History

See Appendix A.

B. Factual and Legal Background

Section 3206 of Title 35-A allows affiliated interests of small investor-owned utilities to sell retail generation services to retail customers within and outside their service territories.[1] Section 3206 directs the Commission to promulgate rules to govern the extent of separation necessary between a small investor-owned transmission and distribution utility and its affiliated competitive

[1] Small investor-owned utilities are defined as those investor-owned transmission and distribution utilities serving 50,000 or fewer retail customers. In its most recent annual report filed with the Commission, MPS reported that it was serving approximately 35,000 customers and thus qualifies as a small investor-owned utility.

electricity provider to avoid cross-subsidization and market power abuses. Pursuant to this legislative directive, the Commission has adopted Chapter 304 governing the standards of conduct between T&D utilities (including small investor-owned utilities) and their affiliated competitive providers.

Chapter 304, § 3(A) provides that a distribution utility may not, through a tariff provision or otherwise, give its affiliated competitive provider preference over non-affiliated competitive electricity providers. In addition, Chapter 304, §§ 3(F) and 3(G) provide that a distribution utility shall process all similar requests for information in the same manner and within the same time period and prohibits the utility from sharing with any competitive electricity provider any market information developed by the utility in the course of responding to requests for distribution service. For an affiliated provider to offer competitive services, the distribution utility must have filed with the Commission an implementation plan which among other things contains a dispute resolution mechanism. Under Chapter 304, § 3(K), employees may not be shared between a distribution utility and its affiliated competitive provider, unless the Commission explicitly allows an exemption upon specified findings.

In *Maine Public Service Company, Request for Approval of Reorganization Approvals and Exemptions and for Affiliated Interest Transaction Approvals,* Docket No. 98-138, Order (Sept. 2, 1998), we approved a management service agreement between MPS and Energy Atlantic (EA), an affiliated interest of MPS engaged in competitive electricity provider activities, which allowed MPS to perform overall management oversight through the sharing of the MPS president and one member of MPS's senior management. In approving the contract, the Commission noted:

> Our approval is premised on the nature of the management oversight being similar to that of a board of directors, rather than that of executive management. As part of our conditions for approval, MPS is required to notify the Commission in writing as to the information provided to EA and the means by which the information was disclosed to non-affiliated providers.

Order, Docket No. 98-138 at 11.

In its complaint of October 31, 2000, WPS alleged that Stephen Johnson, by acting as General Counsel for MPS and the Vice-President of MPS's unregulated activities, including EA, is in a position to have access to competitive confidential information to the disadvantage of EA's competitors; that in two contract unbundling cases, Mr. Johnson received confidential WPS price

information in his capacity as general counsel for MPS, and that Mr. Johnson's dual role could be used to undermine the Chapter 307 auction process.[2]

In addition to the problems associated with Mr. Johnson's dual role, WPS alleged that shortly after it acquired a retail aggregate customer group and enrolled it with MPS, EA contacted the customer group and asked if there was anything it could do to keep the customers from signing with WPS; that MPS violated Chapter 301 of the Commission's Rules by failing to provide WPS's name as the standard offer provider on its bills; that MPS has refused to include WPS's logo as part of its standard offer identification on MPS's consolidated bills in violation of section 3(D) of Chapter 322; and that MPS has routinely provided large customer usage data to EA but refused initially to provide such information to WPS.

WPS concluded that the sharing of MPS employees with EA and the dual role of Mr. Johnson are not in the public interest and create an unreasonable risk of causing an "anti-competitive" effect within the meaning of Chapter 304(K).

On November 17, 2000, MPS filed its response to WPS's complaint along with motions to dismiss and for summary judgment. On May 1, 2001, the Commission issued its Order Denying in Part and Granting in Part Motions to Dismiss and for Summary Judgment. In that Order, the Commission referred back to the parties, for processing under MPS's dispute resolution procedure, the following claims of violations made by WPS in its complaint:

1. disclosure of confidential WPS generation price information provided in contract unbundling proceedings;

2. disclosure of customer enrollment information to EA;

3. disparate treatment concerning provision of large customer usage data; and

4. failure to include its name as the standard offer provider on consolidated utility bills.

On June 29, 2001, William Devoe, the investigator selected to handle this dispute pursuant to MPS's Chapter 304 Implementation Plan, issued his proposed findings and decision on these issues. Under Section II(M)(iii) of

[2] Chapter 307 of our Rules sets out the procedure which utilities are to follow to sell capacity and energy from their generation assets which have not been divested pursuant to 35-A M.R.S.A. § 3204(1).

MPS's Implementation Plan, MPS and the complainant may mutually agree to accept the investigator's findings as the full and final resolution of the dispute, but are not obligated to do so. At a July 5, 2001 case conference, counsel for MPS and counsel for WPS indicated that they had agreed to accept the findings and recommendations of the investigator as the full and final resolution of the matters referred back for informal dispute resolution. In light of the Commission's May 1, 2001 Order and the parties' acceptance of the investigator's report, the sole remaining issues in this case then were:

1) whether Mr. Johnson's involvement at Energy Atlantic exceeded the "manage like a board of directors" standard set forth in Docket No. 98-138;

2) whether experience suggests that Mr. Johnson's dual role is inherently problematic;

3) whether the conditions that supported employee sharing have materially changed since the issuance of the Commission's Order in Docket No. 98-138; and

4) if MPS and EA are to continue to share employees, whether a clarification of the "manage like a board of directors" standard is warranted.

On March 8, 2002, we received a Revised Stipulation signed by all parties to the case and also supported by our Advisory Staff, which resolves all of the above-referenced outstanding issues.

III. DESCRIPTION OF THE STIPULATION

The Stipulation proposes to amend the Order in Docket No. 98-138 to allow for the sharing of one MPS employee (MPS Designated Executive). This individual would be someone other than the MPS General Counsel and could provide oversight and management guidance, including strategic planning to EA. The Designated MPS Executive is authorized to discuss the management of EA with MPS senior management on a limited basis within the expertise and/or responsibility of such MPS senior managers. The Designated MPS Executive, however, may not be involved in certain activities (Restricted Activities) at MPS.

The Restricted Activities include participation in the standard offer process, participation in the Chapter 307 sale of MPS generation entitlements, negotiating or drafting any special rate contract with MPS customers or actively participating in the approval of such special rate contracts, and participating in any communications between MPS and a competitive electric provider (CEP) or an MPS customer regarding the terms of a CEP's service to any retail customer in the MPS service area. No outside attorney retained by MPS to represent the

Company in any of the Restricted Activities may also represent EA in any of the Restricted Activities. MPS's General Counsel may provide legal services to EA but may not provide representation to EA in any of the Restricted Activities nor can such individual provide representation in the negotiation, execution or enforcement of specific supply contracts between EA and its retail customers.

Under the terms of the Stipulation, the Designated MPS Executive is to maintain a detailed log of all contacts with EA employees. The Commission shall have the right, not more frequently than once a year, to conduct a compliance audit to determine whether MPS or EA has engaged in any violations of Chapter 304 of the Commission's Rules or MPS's Implementation Plan. The Stipulation further provides that no further Commission action shall be taken against MPS or EA as a result of any allegation raised in this proceeding or a result of any fact brought out during the discovery process in this case.

IV. DECISION

As we have stated on numerous occasions, to approve a stipulation the Commission must find that:

1. the parties joining the stipulation represent a sufficiently broad spectrum of interests that the Commission can be sure that there is no appearance or reality of disenfranchisement;

2. the process that led to the stipulation was fair to all parties; and

3. the stipulated result is reasonable and not contrary to legislative mandate.

See Central Maine Power Company, Proposed Increase in Rates, Docket No. 92-345(II), Detailed Opinion and Subsidiary Findings (Me. P.U.C. Jan. 10, 1995), and *Maine Public Service Company, Proposed Increase in Rates (Rate Design),* Docket No. 95-052, Order (Me. P.U.C. June 26, 1996). We have also recognized that we have an obligation to ensure that the overall stipulated result is in the public interest. *See Northern Utilities, Inc., Proposed Environmental Response Cost Recovery,* Docket No. 96-678, Order Approving Stipulation (Me. P.U.C. April 28, 1997). We find that the proposed Stipulation in this case meets all of the above criteria.

In this case, the Stipulation was entered into by all parties to this matter (MPS, WPS, the OPA and the IECG). The stipulating parties represent a sufficiently broad spectrum of interests to ensure that there is no appearance or reality of disenfranchisement.

There has not been any indication given by any party to this matter that the process that ultimately lead up to the Stipulation was anything but fair. We thus find that our second criterion has also been satisfied.

In deciding whether a stipulation is fair and consistent with the public interest, the entire stipulation must be considered as a package. Whether we disagree with a particular stipulation provision or would have come up with a different resolution were we deciding the case after litigation is not the question. *Central Maine Power Company, Request for Approval of Alternative Rate Plan (Post-merger) "ARP 2000,"* Docket No. 99-666, Order Approving Stipulation at 13 (Nov. 16, 2000). The question is whether the particular proposal before us is reasonable and consistent with the public interest. *See Docket No. 92-345 (Phase II), supra.,* Order at 3. In deciding this question, any detriments which have been raised must be weighed against the benefits of the stipulation.

On an overall basis, we believe the Stipulation fairly and reasonably resolves all outstanding issues in this case and appropriately balances the competing interests of the parties. The Stipulation helps ensure that EA will not unfairly benefit from its relationship with its regulated T&D affiliate, MPS, while at the same time the provisions do not unfairly restrict EA's ability to conduct its business. Thus, we find that the Stipulation furthers our goal of maintaining a level playing field for the participants in the northern Maine retail generation market.

The one provision of the Stipulation which causes us with some concern is paragraph 12 which provides:

> The Commission shall have the right, not more frequently than once a year, to conduct a full compliance audit to determine whether either EA or MPS have engaged in any violations of Chapter 304 or MPS's Implementation Plan. This audit may be conducted at a time and by a law firm or other third party investigator of the Commission's choosing and shall be paid for by MPS, up to a total amount of $10,000 annually, which amount may not be recovered from MPS's ratepayers … <u>The audit agreed to in this paragraph is not intended to limit the Commission's authority to otherwise investigate or audit MPS pursuant to the Commission's express statutory authority.</u> (emphasis added)

On its face this language appears to limit our ability to audit MPS's relationship with EA. However, given the extremely broad powers given to us by 35-A M.R.S.A. §§ 112, 113, 707 and 1303, we do not believe, as a practical matter, that the language in the Stipulation in any way restricts our ability to

further investigate or audit the relationship between MPS and EA should we find that such a further investigation or audit is warranted. With this understanding, we find the Stipulation to be in the public interest and consistent with statutory requirements.

Accordingly, it is

O R D E R E D

1. That the Revised Stipulation entered into between the parties in this case and filed with the Commission on March 8, 2002 is approved. A copy of the Revised Stipulation is attached hereto and incorporated by reference.

2. That our Order of September 2, 1998 in Docket No. 98-138 is hereby modified in accordance with the terms of the Revised Stipulation approved herein.

Dated at Augusta, Maine, this 29th day of April, 2002.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

APPENDIX A

On October 31, 2000, WPS Energy Services, Inc. filed a complaint with the Commission against Maine Public Service Company pursuant to 35-A M.R.S.A. §§ 1306, 3206 and 3206-A. In addition, as a part of this pleading, WPS petitioned the Commission, pursuant to the provisions of 35-A M.R.S.A. § 1321, to alter or amend the Commission's decision in Docket No. 98-138.

On November 17, 2000, MPS filed its response to the complaint along with motions to dismiss and for summary judgment. In support of its motion for summary judgment, MPS filed affidavits from Stephen Johnson and Brent M. Boyles. On December 18, 2000, WPS filed its Opposition to Maine Public Service Company's Motion to Dismiss and for Summary Judgment, a Statement of Material Facts and Supporting Affidavits of Edward Howard, Tim Charette and Dwayne Conley. On January 5, 2001, MPS filed its Reply to the WPS Opposition along with its Statement of Material Facts As To Which There Is No Issue.

On May 1, 2001, the Commission issued its Order Denying in Part and Granting in Part Motions to Dismiss and For Summary Judgment in Docket No. 2000-894. In that Order, the Commission initiated this investigation and reopened its decision in Docket No. 98-138.[3]

A Procedural Order which provided interested persons with an opportunity to intervene in this matter was issued on May 23, 2001. Under the Procedural Order, WPS Energy Service, Inc. and Maine Public Service Company were considered parties at the outset. In addition, the Office of the Public Advocate, an intervenor in Docket No. 98-138, was also considered a party at the outset.

Timely petitions to intervene were filed by Central Maine Power Company and the Industrial Energy Consumers Group. In its petition, CMP claimed that as a transmission and distribution utility it was subject to the requirements of Chapters 301, 304 and 322 of the Commission's Rules and therefore it "is or may be substantially and directly affected by this proceeding." Counsel for MPS questioned whether CMP needed to participate in the factual aspects of the case. Based on the arguments at the conference, and with the consent of the parties, CMP was granted discretionary intervention status with participation limited to briefing and commenting on policy matters.

In its petition, the IECG claimed that "it has been and continues to be substantially and significantly involved in the development in competitive markets for electricity, not just in southern Maine, but on a statewide, regional and national levels." MPS argued that since the IECG had no members which were customers of MPS they were not directly affected by the outcome in this

[3]By way of a Procedural Order dated June 27, 2001, Docket No. 98-138 was consolidated in this docket and closed.

proceeding and, therefore, should not be given full party status. MPS indicated that it would agree to limited intervention similar to that granted to Central Maine Power Company whereby the IECG would receive all filings and could brief and comment on legal and policy questions. The Examiner concluded that, although the IECG would not directly and substantially be affected by the outcome of this proceeding, and therefore was not entitled to intervene as a matter of right under section 720 of the Commission's Rules of Practice and Procedure, the IECG's interest was sufficient to warrant full party status as a discretionary intervenor pursuant to MPUC Rules, ch. 110, § 721.

On July 13, 2001, the Examiner issued a Procedural Order which found that there was a reasonable likelihood, given the narrowing of the issues in this case, that the remaining issues could be presented on a stipulated set of facts. A deadline of August 3, 2001 was established for either the parties to submit a stipulated set of facts or for MPS to submit its pre-filed testimony. At the request of the parties, this deadline was extended until September 7, 2001. On September 7, 2001, MPS submitted the pre-filed testimony of Stephen Johnson. A technical conference on Mr. Johnson's testimony was held on October 17, 2001.

A case conference was held on November 6, 2001 to discuss the next steps to bring this proceeding to a conclusion. At that time, all parties agreed that hearings were not necessary and the case could be presented to the Commission based on the discovery conducted to date (including the October 17, 2001 technical conference) and on briefs. The parties also agreed that it appeared possible that the remaining issues could be resolved through a negotiated agreement.

Following the case conference, a number of settlement conferences involving the parties and the Advisory Staff were held. On February 27, 2002, the Commission received a Stipulation entered into between MPS, WPS, the OPA and the IECG. On March 8, 2002, we received a Revised Stipulation which withdrew and replaced the earlier Stipulation.